Ok, Boomer

Maximilian Steinbeis 2021-04-30T23:54:46

In Germany, it seems, the really important things are decided by the Federal Constitutional Court. In the US, it is the president who is pushing towards a more ambitious climate protection policy. And in our country, there was a time when the political system of the Basic Law was described as a *Kanzlerdemokratie* (chancellor democracy). Would, some may wonder, *Karlsruhedemokratie* be more appropriate? Has the *Bundesverfassungsgericht* with this week's seminal decision on the Climate Protection Act once again overreached, narrowed the scope of political action, acted as a substitute legislator?

The opposite, I think, is true.

The First Senate of the BVerfG, in line with the state of scientific knowledge, reconstructs the climate situation as a control loop: a thermostat pumps more energy into the system when it gets too cold. The climate legislator pumps more restrictions on the freedom to emit carbon dioxide into the system when it gets too hot. Exactly how much, is variable and depends on what is necessary to stay clear of the setpoint, which is fixed: 1.5°C, or at least well below 2°C above the pre-industrial temperature level. The thermostat keeps temperature above the freezing point, beyond which the pipes burst and the house gets flooded and most likely ruined altogether along with the plumbing, the heating and most of anything else in it. The climate legislator keeps temperature below the 1.5-to-well-below-2°C level, beyond which the conditions for the possibility of living freely on this planet will likely no longer exist for most people.

In the Climate Protection Act, the legislator has committed itself to this concrete figure, guided by the Paris climate protection agreement. However, the obligation to operate the controller in observance of this figure is imposed on it by the Basic Law, namely by Article 20a. This otherwise rarely noted norm obliges the state to protect the natural foundations of life. Environmental and climate protection is not a matter of political expediency, to be negotiated between those who reap the profits and those who pay the costs, but a constitutional duty imposed on all politics from the outset. This norm does not entitle individuals, but neither is it just a non-binding programmatic statement. It is a legal obligation and as such justiciable. If the legislator fails to comply with it, its actions or omissions are unconstitutional, and the Federal Constitutional Court may declare it so.

How the legislature fulfils this obligation, however, is mostly left to its discretion. It is up to the legislator to decide exactly when and where to shift the controller, as long as it only makes sure that the setpoint is observed. Could it then also say: Let's go easy with the controller today and tomorrow and rather push it up all the way the day after tomorrow? No. It can't.

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We know sufficiently well how much carbon mankind in general and Germany in particular can still emit before the temperature will rise to catastrophic levels. To use up a large part of this residual carbon budget by 2030 and leave correspondingly little for the time after amounts to – and this is probably the most spectacular innovation of this judgment – a violation of fundamental rights. Cutting down carbon emissions means restricting liberty. If we save less carbon emissions today and tomorrow, we must save all the more carbon emissions the day after tomorrow. If we do less restriction of liberty today and tomorrow, we will have to expect more drastic restrictions the day after tomorrow – and with correspondingly weaker protection of fundamental rights: because the closer we get to the standard value of 1.5-<2°C, the more incisive restrictions of constitutional rights will be justified and even mandated by the duty to preserve the natural foundations of life under the aforementioned Article 20a *Grundgesetz*.

This means: The restrictions on fundamental rights on the day after tomorrow, to which our current carbon consumption will force us in the future, are not something we will inflict on ourselves the day after tomorrow. It is what we are inflicting on ourselves today. For this reason, the annual emission levels until 2030, which are formulated in the Climate Protection Act, have an “advance interference-like effect” (*eingriffsähnliche Vorwirkung*) and therefore already require justification today. Otherwise, they violate the plaintiffs’ fundamental rights – directly and presently.

On the one hand, this is less than many had hoped for: The Senate does not tell the legislator that the reduction of carbon emissions it has committed itself to until 2030 is insufficient to fulfil its constitutional duties, even though it is probably safe to say it is. In essence, the court only says that the legislator must declare and take responsibility for how the remaining carbon budget is distributed over the future years, instead of simply saying that we will gobble up the bulk of the budget between now and 2030 and leave the small slice that remains to the care of whoever is in charge then.

On the other hand, it is also more: because with this, the legislator must take responsibility for the future, not just as an empty phrase, but as a constitutionally enforceable duty. It must justify what it does to those who will have to bear the consequences. That is what the constitution does: it opens the space for the diversity of political opinions and interests by providing procedures and institutions to negotiate for compromises and majorities. But for this to work at all, it also limits that space, granting rights to the outvoted and excluded, so that the majority does not simply walk over them and externalize the costs of its decisions. This now also applies to externalizing costs to the future. Anyone who operates the controller in this way may be interfering with fundamental rights and owing justification accordingly.

Justification is what the BVerfG demands of the legislator. This is not an encroachment on the sphere of politics, but a contribution to keeping democratic politics alive. Politics remains responsible for defining how it intends to fulfil its duty to protect the fundamental rights to life, limb and property, and the natural foundations of life. That is what they must do. They must take responsibility for how the remaining carbon budget is to be spent. They must plan the gradual reduction of carbon emissions to the point of climate neutrality sufficiently in advance, in a sufficiently differentiated way and sufficiently far into the future, so that everyone can prepare for what is coming. They must regulate the essentials by proper parliamentary legislation and not just delegate it to government ordinances. They must deliberate on this publicly, in the *Bundestag*, in speech and counter-speech between government majority and opposition minority. That is what the Federal Constitutional Court demands. And that is precisely its job.

I owe the title idea to Matthias Goldmann.

The week on Verfassungsblog

On the very day of the **climate-change decision** from Karlsruhe, ANNA-JULIA SAIGER has provided a first assessment of what the BVerfG has decided in detail and what's so new and exciting about it. ANDREAS BUSER further analyses the decision and emphasises, among other things, that the court "opens the door to Karlsruhe for all individuals affected by climate change" and thus creates "the much-discussed 'actio popularis' for the area of climate protection". MATTHIAS GOLDMANN focuses on the skillful way in which the First Senate refers to international law for its argument and contrasts it with the Second Senate's "zero sum approach" to international obligations.

The other big topic this week: the "**federal emergency brake**" in the Covid defence battle. Administrative act, government ordinance or legislative act seem to have become completely interchangeable in pandemic measures. Nevertheless, the new federal infection control law neither violates the separation of powers nor does it constitute a prohibited individual case statute (*Einzelfallgesetz*), writes SEBASTIAN KLUCKERT. As TRISTAN WISSGOTT explains, an interference with personal liberty cannot take place "by" but only "on the basis of" a law, though, which renders the curfews ordered by the law unconstitutional. From a formal point of view, HOLGER GREFRATH points out the lack of approval by the *Bundesrat*, which is why the law is already formally unconstitutional.

The ruling of the Federal Constitutional Court on the **Berlin rent cap** does not cease to keep us busy: STEFAN SCHLEGEL compares the decision to a Swiss verdict and suggests a combination of both solutions.

An appendix to our coverage of the BVerfG's decision on the **Own Resources Act** of last week: HANNO KUBE's analysis is now also available in English.

As is well known, the *Bundesverfassungsgericht* reserves the right to review European legal acts by means of "ultra vires" review and the concept of constitutional identity. JACQUES ZILLER is pleased with a ruling of the French **Conseil d'Etat** on the same day as the afore-mentioned Own Resources Act decision, which, unlike the German Court, recognises the ultimate authority of the European Court of Justice. SHAHIN VALLÉE and a pseudonymous co-author, however, take a diametrically opposed view of the same decision: The French court goes even further than the BVerfG by establishing a kind of national security policy *Solange* reservation in the name of French constitutional identity.

In **Finland**, there might be a constitutional conflict about EU policy ahead: on 27 April, Parliament's Constitutional Committee tied approval of the EU's Own Resources Decree to a two-thirds majority. The already shaky government does not have that and is therefore considering testing the limits of the binding effect of this decision. For many Finnish MPs, this creates a dilemma between their commitment to Europe and respect for the Finnish Constitution, argues PÄIVI LEINO-SANDBERG.

In **Poland**, the “Constitutional Court” hijacked by the governing PiS party has postponed the big clash with the EU legal order and will probably not deliver the anti-ECJ “verdict” ordered by the government until 15 May. On the other hand, the dice have been cast over the civil rights commissioner Adam Bodnar: the Przy#ebska “Court” has given the PiS the go-ahead to eventually fill the post with their own candidate. Thus, once again, the party has managed to circumvent the political process in order to achieve its desired goal, writes JAN MUSZY#SKI and explains why everyone but PiS loses in the process. TOMASZ TADEUSZ KONCEWICZ draws an all-round pessimistic picture: in his view, the European institutions, first and foremost the Commission, are taking their own leave of the EU legal order by acting according to political expediency and playing the game of the autocrats.

Elections are due in **Hungary** in 2022, which could mark the end of the rule Orbán and the Fidesz party – temporarily, that is. In that case, the question is how a democratic government can reverse the damage wrought on the rule of law. For ZOLTÁN FLECK, there is only one solution: a new constitution.

Another court decision on EU constitutional law of tremendous importance has received far too little attention, in my view: the ***Repubblika*** ruling of the European Court of Justice. From a combination of Art. 49 TEU (EU enlargement) and Art. 2 TEU (EU values), the ECJ derived a new “non-regression” principle. DIMITRY VLADIMIROVICH KOCHENOV and ALEKSEJS DIMITROVS explain why this is an important victory in the fight to secure the fundamental EU values from post-accession backsliding and might finally fix the notorious “Copenhagen dilemma”.

European police law is in the midst of a paradigm shift. In the meantime, an increasing standardisation of Member State security law can be observed, which has far-reaching consequences not only for the protection of fundamental rights, finds KRISTIN PFEFFER.

The EU is currently trying with increased intensity to finally conclude a treaty that has been under negotiation for years and which is intended to place **Switzerland’s** association with the Union’s legal system in an institutional framework. The intended dynamisation and institutionalisation would be a significant step towards integration, says BENEDICT VISCHER.

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All best,
the Verfassungsblog team

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As with the GDPR before, actual enforcement will be a key hurdle in the European Commission's **Digital Services Act**. DANIEL HOLZNAGEL proposes a solution that replaces the "country of origin" principle and includes all member states, not only Ireland, in the supervision.

China is accused by various states of committing genocide against the Uyghurs in Xinjiang. JULIA EMTSEVA on why targeted sanctions alone might not be enough to bring justice to the victims.

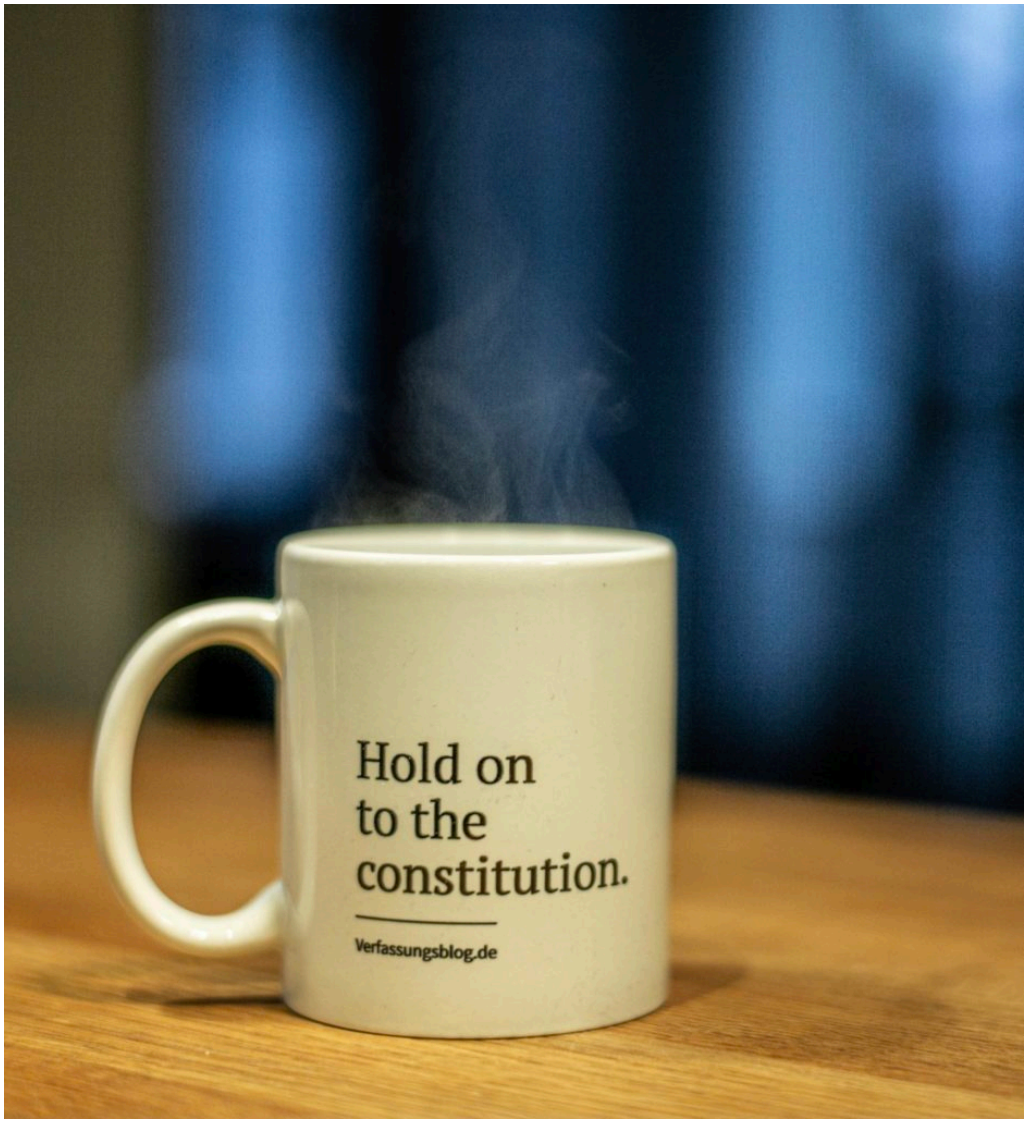
Recently, the **Inter-American Commission on Human Rights** issued a resolution on "Covid-19 vaccines and inter-American human rights obligations". MARIELA MORALES ANTONIAZZI argues that the resolution clarifies the duty of states to develop an inter-American standard for equitable access to vaccines.

In the second year of the pandemic, **foreign seasonal workers** continue to work in precarious conditions in Germany. RALUCA BEJAN and MANUELA BOATC# report on how agribusiness has successfully put pressure on the government to make health care dependent on citizenship.

Nothing will come of the "**Super League**" in European soccer for now – but the legal issues involved remain. In CHRISTOPHER UNSELD'S view, European antitrust law does not and has not stood in the way of the associations blocking the "Super League".

That's all for now.

Fancy one of these?



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All the best, thank you and see you soon,

Max Steinbeis
